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No. 84-1023

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

FERNANDO ROJAS-CONTRERAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the defense preparation period provision of the Speedy Trial Act, 18 U.S.C. 3161(c)(2), prohibits commencement of trial within 30 days of a defendant's arraignment on a superseding indictment when a defense preparation period of 30 days has already been allowed following arraignment on the original indictment.

2. Whether, in the circumstances of this case, any violation of Section 3161(c)(2) was harmless.

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Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635 (1981) 9
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The district court's oral ruling denying respondent's motion for a continuance (Pet. App. 3a-4a) likewise is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1984. A timely petition for rehearing was denied on September 26, 1984 (see Pet. App. 5a). On November 17, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 26, 1984. The petition for a writ

of certiorari was filed on December 26, 1984, and was granted on February 19, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Speedy Trial Act provides in pertinent part (18 U.S.C. 3161(c)(2)):

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Additional provisions of the Act that are referenced in the text are reproduced in the appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent, a Mexican citizen, was convicted of illegal entry into the United States having been convicted previously of the same offense, in violation of 8 U.S.C. 1325. He was sentenced to a term of imprisonment of one year and one day. The court of appeals reversed respondent's conviction on Speedy Trial Act grounds.

1. The evidence at trial showed that respondent is a citizen of Mexico and not a United States citizen. On December 7, 1981, respondent was convicted of illegal entry into the United States and was sentenced to one year's imprisonment. After serving his sentence, he was returned to Mexico (Tr. 256-257).

Thereafter, at approximately 4:00 a.m. on February 13, 1983, respondent entered the United States on foot, five miles east of the Chula Vista official port of entry. He carried no immigration documents with him. Respondent walked north along a flat mesa, crossed the Otay River, and stopped to rest on the southwest bank of Otay Lake. At 9:30 a.m., Border Patrol Agent William Harris found respondent and another alien sitting along the bank. Five other aliens were hiding nearby under a sheet of plastic. Each member of the group had muddy shoes and grass and straw in his hair, indicating that the group had just hiked from the border. Agent Harris asked the group if they were from Mexico, to which they replied, "yes." Tr. 156-166, 181, 186-192, 262.

Agent William Burt then arrived at the scene and recognized respondent as someone he had arrested before. Respondent was taken to the Brown Field Station and, after waiving his *Miranda* rights, agreed to talk to Agent Burt. Respondent identified himself as "Santiago Montano Meneses." He admitted that he had entered the United States that morning five miles east of the official port of entry and that he carried no documents entitling him to enter the United States. He further admitted that he had a prior arrest record for illegal entry. Respondent signed a voluntary departure form acknowledging that "I am illegally in the United States." Tr. 189-193, 209-217.

That night, after again waiving his *Miranda* rights, respondent told Border Patrol Agent Ted Stark that his name was in fact Fernando Rojas-Contreras, and that he had previously been convicted of and had served time for illegal entry. He also acknowledged that he had been sent back to Mexico upon his release from prison and that he had reentered the United States through the hills south of Otay Lake early that morning. Tr. 259-265.

2. On February 18, 1983, a federal grand jury sitting in the Southern District of California returned a two-count indictment charging respondent with felony illegal entry, in violation of 8 U.S.C. 1325, and reentry by a deported alien, in violation of 8 U.S.C. 1326. The indictment stated that the judgment of conviction for the prior illegal entry, which formed the predicate for enhancement of the Section 1325 offense to a felony, was

"rendered on or about December 17, 1981" (E.R. 4).[1] Respondent was arraigned on the two-count indictment on February 18, 1983. Trial was thereafter scheduled for April 19, 1984.

The date of the predicate conviction (actually December 7, 1981) was misstated by ten days in the February 18 indictment as a result of a typographical error (Tr. 15). It is undisputed that, on March 21, 1983, the respondent was provided with discovery by the government that disclosed the correct date of the predicate conviction (Tr. 15, 24).[2] On April 15, 1983, the grand jury returned a superseding indictment correcting the typographical error in Count One by changing "17" to "7." The superseding indictment charged the same two offenses as the original indictment; indeed, its wording was in all respects save the date of the predicate conviction identical to the original indictment (see E.R. 6-7). Respondent was arraigned on the superseding indictment on April 18, 1983 (Tr. 5-6).

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[1] "E.R." denotes the excerpt of record prepared by respondent's counsel and filed in the court of appeals. Count One of the February 18 indictment charged, in its entirety (E.R. 3-4):

> On or about February 13, 1983, within the Southern District of California, defendant FERNANDO ROJAS-CONTRERAS, who was then and there an alien, did knowingly and unlawfully enter the United States from Mexico at a point near San Ysidro, San Diego County, California, which said time and place were then and there other than as designated by immigration officials of the United States for the entrance of immigrants into the United States; that before the commission of the offense hereinbefore set forth, said defendant was, in the United States District Court for the Southern District of California, convicted of the crime of illegal entry, and the judgment was pronounced and rendered on or about December 17, 1981: in violation of Title 8, United States Code, Section 1325.

[2] It also appears that respondent was represented in the earlier prosecution by counsel associated with the Federal Defenders of San Diego, Inc., which also supplied his counsel in connection with the present prosecution (Tr. 21-22).

3. At a pretrial conference later on April 18, 1983, defense counsel made an oral motion for a 30-day continuance of the trial, which was scheduled to commence the next day. He argued that, under Section 3161(c)(2) of the Speedy Trial Act, as interpreted by the Ninth Circuit in *United States* v. *Arkus*, 675 F.2d 245 (1982), respondent had an absolute right to a new 30-day trial preparation period following the return of the superseding indictment, even though the statutory trial preparation period had already been allowed following the original indictment.[3] Defense counsel asserted (Tr. 6) that *Arkus*

> holds once there is a rearraignment I have an automatic, if I so claim it, 30-day period. In fact, it's only to be excused if there's an express waiver of counsel. And so therefore under the statute and *Arkus*, I would make that demand.

In invoking Section 3161(c)(2), defense counsel simply relied on *Arkus*, which he described as "rather clear cut" (Tr. 9). He did not claim that respondent was in any respect prejudiced by the alteration in the date of the predicate offense accomplished by the superseding indictment, and he did not deny that he had been advised of the typographical error in the original indictment well in advance of the scheduled trial date. Respondent's counsel did argue that he needed additional time to consult a fingerprint expert and to review respondent's immigration ("A") file, but he did not claim that the need for additional time to complete these tasks had anything to do with the change in the indictment. Review of the immigration file, counsel urged, was necessary to defend the illegal reentry violation charged in Count

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[3] The record suggests (Tr. 15) that the prosecutor initially called the attention of defense counsel to the court of appeals' decision in *Arkus*, believing that it was distinguishable, but that it was appropriate to allow the defense an opportunity to call it to the district court's attention.

Two; the fingerprint expert was needed, respondent argued, to determine whether respondent was the same person convicted of illegal entry on December 7, 1981. Tr. 10-12.

Citing the Seventh Circuit's decision in *United States* v. *Horton*, 676 F.2d 1165 (1982), cert. denied, 459 U.S. 1201 (1983), and seeking to distinguish *Arkus* on factual grounds, the government disputed that the Speedy Trial Act required a new 30-day defense-preparation period following the return of a superseding indictment in the circumstances of this case (Tr. 15-16, 17, 18-19). With respect to the separate practical justifications given by respondent for a discretionary continuance, the government pointed out that its own fingerprint expert had not yet compared respondent's prints to the prints of the person convicted on December 7, 1981, but that he planned to do so the following morning. The court ordered the government to have its expert contact defense counsel with the results of the analysis as soon as he had completed the task (Tr. 26-27). Ultimately, however, respondent agreed to stipulate that he was indeed the person convicted of illegal entry on December 7, 1981, rendering unnecessary expert testimony as to respondent's identity (Tr. 61, 256-257). In order to moot respondent's plea that he could not defend the charge in Count Two until he had reviewed the immigration file, the government offered to dismiss Count Two and to proceed to trial the next day on Count One alone. The court conditioned its denial of respondent's continuance motion upon dismissal of Count Two (Tr. 18, 23, 25-26).

In denying respondent's motion for a 30-day continuance, the district court relied substantially on the Seventh Circuit's decision in *Horton* and distinguished *Arkus* on factual grounds (Tr. 23-25). The court also emphasized that respondent was not in any respect prejudiced by being required to go to trial on the superseding indictment (Tr. 24-25):

> [T]he first issue before the court is whether or not there is any prejudice that has been shown by virtue of him going to trial on the superseding indictment on which he was just arraigned this morning. In other words, is the change of date in Count 1 so significant and causes a significant problem. I see none.
>
> To the extent that it appears that the discovery was very clear, the date that was being discussed is the date of the indictment, and therefore certainly the basis for their felony, and the prior act was clear from the discovery and clear from the inception. So it was a ministerial act to correct a date error where a "1" had been inserted in error, and that has been corrected by the superseding indictment. So I find that there has been no change—I mean, no prejudice from the superseding indictment.

4. The court of appeals reversed, holding that under its decision in *United States* v. *Harris*, 724 F.2d 1452 (1984), which in turn relied on *Arkus*, respondent was entitled to a new 30-day defense preparation period following his arraignment on the superseding indictment (Pet. App. 2a). The court of appeals rejected the government's argument that, because the superseding indictment merely corrected a typographical error of which defense counsel was already aware, no new defense preparation period was required. The court commented only on the government's observation that the original indictment could have been amended without resubmitting the case to the grand jury, describing this circumstance as "immaterial" and stating (Pet. App. 2a): "It was the government who chose to proceed by way of reindictment." Finally, citing its decision in *United States* v. *Daly*, 716 F.2d 1499, 1506 (1983), the court of appeals held that reversal of respondent's conviction was required to remedy the Speedy Trial Act violation (Pet. App. 2a):

> [A]ny pretrial preparation period shorter than thirty days is inadequate *per se*. No showing of prejudice is required.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The Speedy Trial Act of 1974, as amended in 1979, 18 U.S.C. 3161 *et seq.*, establishes inside and outside time limits for commencing trial in criminal cases. Essentially, it constructs a window of time during which a case must be tried. On the one hand, pursuant to Section 3161(c)(2), the provision at issue here, added to the Act by the 1979 Amendments, trial may not commence earlier than 30 days "from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se" unless the defendant consents in writing to an earlier trial date. On the other hand, trial must begin no later than 70 days after "the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. 3161(c)(1). Certain proceedings, however, like the filing of a pretrial motion, automatically extend the 70-day limit by stopping the clock and creating periods of excludable delay. 18 U.S.C. 3161(h)(1)-(7).[5] The maximum time limit can also be extended in

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[4] Following the decision of the court of appeals, respondent completed the term of imprisonment to which he was sentenced and was returned to Mexico (see Br. in Opp. 6). As explained in our Reply Memorandum at the petition stage (at 2-5), these developments do not moot this case, for respondent's conviction, if reinstated, will have significant collateral consequences. See also *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 9.

[5] It is generally held—and it is our view—that the 30-day minimum pretrial preparation period is not extended by such periods of excludable delay. See *United States* v. *Wooten*, 688 F.2d 941, 949-951 (4th Cir. 1982); *United States* v. *Mastrangelo*, 733 F.2d 793, 796-797 (11th Cir. 1984); see also Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* 14-15 (rev. 1979, with amendments through Oct. 1984); Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635, 653 (1981); but see S. Rep. 96-212, 96th Cong., 1st Sess. 32 (1979); *United States* v. *Arkus*, 675 F.2d at 248 & n.4.

the discretion of the district court if the ends of justice so require. 18 U.S.C. 3161(h)(8). For instance, the 70-day period may be extended to ensure that the defendant has a "reasonable time to obtain counsel" and to ensure that his counsel has "reasonable time necessary for effective preparation." 18 U.S.C. 3161(h)(8)(B)(iv).

The question presented in this case concerns identification of the earliest permissible date for starting trial in a prosecution in which a superseding indictment has been returned. In our view, Section 3161(c)(2) does not guarantee a defendant a new 30-day preparation period following the return of a superseding indictment. The contrary holding of the court below has been rejected by every other court of appeals that has considered this issue.[6]

I

A. The court of appeals' decision is contrary to the language of Section 3161(c)(2), which provides a 30-day trial preparation period running from the "defendant['s] first appear[ance] through counsel." A defendant's arraignment on a superseding indictment charging the same offense plainly is not the defendant's first appearance, and it accordingly does not trigger a new 30-day period.

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[6] See *United States* v. *Guzman*, 754 F.2d 482, 485-486 (2d Cir. 1985), petition for cert. pending, No. 84-1604; *United States* v. *Rush*, 738 F.2d 497, 510-511 (1st Cir. 1984), cert. denied, No. 84-685 (Feb. 25, 1985); *United States* v. *Williford*, No. 83-1376 (5th Cir. Feb. 27, 1984), slip op. 3-6, cert. denied, No. 83-6814 (Oct. 9, 1984); *United States* v. *Horton*, 676 F.2d 1165, 1169 (7th Cir. 1982), cert. denied, 459 U.S. 1201 (1983); *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981), cert. denied, 455 U.S. 906 (1982).

This reading of the Act is corroborated by other provisions of the elaborate, highly articulated, statutory scheme. Reading Section 3161(c)(2) together with Section 3161(d)(1) and Section 3161(h)(6), it is apparent that Congress deliberately made no provision for the 30-day defense preparation period to start anew following a superseding indictment. In circumstances where Congress did so intend it made explicit provisions therefor in the Act.

The court of appeals' view of the operation of the 30-day rule also brings it into direct conflict with the 70-day rule that governs the outside time limit for trial. The court of appeals' analysis can lead to situations in which there is no trial date that is permissible as of right. Indeed, this case is such a case. Plainly Congress could not have intended such a result.

The court of appeals erroneously assumed that, absent coverage under Section 3161(c)(2), there would be no means for defendants to secure adequate preparation time following a superseding indictment. But wholly apart from the statutory 30-day rule, the district court has ample authority to continue a trial date where the defendant demonstrates actual need for further preparation time resulting from a superseding indictment. And Section 3161(h)(8)(B)(iv) of the Act, wholly overlooked by the court of appeals, ensures that such continuances are not constrained by the Act's 70-day outer time limit for commencing trial.

B. The legislative history of the Act demonstrates that Congress did not intend that the 30-day rule be applied to superseding indictments generally. To begin with, the court of appeal's construction clashes with the overriding purpose of the Act: to expedite criminal trials. While considerations of fairness might sometimes require additional defense preparation time as a result of material changes in a superseding indictment, Congress understood that the district courts would employ their scheduling discretion and grant whatever continuances were necessary to avoid "assembly line justice."

The 30-day defense preparation period provision of the Act, added by a 1979 amendment, was inspired by a set of guidelines developed by the Second Circuit for implementation of the Act. While those guidelines recommended that defendants be allowed at least 30 days' preparation time following arraignment, they made clear that this policy was not directly applicable to trials on superseding indictments. Congress adopted the 30-day rule from the Second Circuit guidelines in 1979 because it feared that some courts had overreacted to the prompt trial mandate of the Act. But there is no indication that Congress believed that the other devices available to assure adequate defense preparation time—the district court's authority to manage its calendar and defense requests for continuances—were inadequate to address any need that might arise for additional time above and beyond the initial 30-day period allowed at the outset of every prosecution. The 1979 legislative history makes unusually clear that Congress intended the Act to be interpreted in conformity with the Second Circuit guidelines.

C. Practical considerations also make clear that return of a superseding indictment should not be held to trigger a new, automatic 30-day preparation period. Superseding indictments are regularly and appropriately employed by federal prosecutors for such purposes as correcting minor or obvious errors in the original indictment, conforming the indictment to the evidence expected to be adduced at trial, and dropping defendants or counts. Such superseding indictments have no material bearing upon the ability of a defendant who has already had 30 days' preparation time to be ready for trial. This case perfectly illustrates our point. It is inconceivable that the correction of an obvious typographical error in respondent's indictment in any way altered his trial preparation burden. And even in cases where some additional preparation time may be warranted, the district court may allow an appropriate continuance—often, only

a brief delay would be necessary—without incurring the pointless delay that an automatic 30-day postponement frequently will entail. The requirement created by the court of appeals of an additional automatic 30-day delay in the trial is not only unnecessary to protect defendants' interests, but can cause severe disruption of the crowded dockets of the district courts, with attendant inconvenience to all participants. The court of appeals' ruling accordingly is strikingly inconsistent with the fundamental purpose of the Speedy Trial Act.

II

Even if the Speedy Trial Act were interpreted to require a new 30-day trial preparation period following a superseding indictment, any statutory violation here was most assuredly harmless error. Nothing in the statutory language or legislative history renders the general harmless error rule inapplicable to violations of the 30-day rule. Indeed, the statute does not prescribe any sanction at all for violations of Section 3161(c)(2). We may assume that a new trial is ordinarily an appropriate remedy, and that the defendant need not go forward with a showing of prejudice to invoke that remedy. But here the prosecution can overcome any presumption of prejudice. The change in the indictment was trivial, and was not, in any event, a surprise to respondent. Respondent has never suggested—and could not credibly suggest—that the superseding indictment affected his readiness for trial.

ARGUMENT

I. THE SPEEDY TRIAL ACT DOES NOT FORBID COMMENCEMENT OF TRIAL SOONER THAN 30 DAYS FOLLOWING A DEFENDANT'S ARRAIGNMENT ON A SUPERSEDING INDICTMENT

A. The Language And Structure Of Pertinent Provisions Of The Act Confirm That Return Of A Superseding Indictment Does Not Automatically Trigger A New Defense Preparation Period

1. In construing Section 3161(c)(2), "we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' *United States* v. *Turkette*, 452 U.S. 576, 580 (1981)." *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4. Here, the statute speaks clearly. Section 3161(c)(2) prohibits the commencement of trial "less than thirty days from the date on which the defendant *first appears through counsel*" (emphasis added). "First" should be given its "ordinary * * * common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). As the dictionary confirms, there can only be one such "first" appearance in a case.[7] And as the Eleventh Circuit observed in *United States* v. *Darby*, 744 F.2d 1508, 1520 (1984), petition for cert. pending, No. 84-1261 (emphasis in original), "[w]hen employing the term 'first,' Congress presumably did not have *subsequent* appearances in mind." Once the defendant has appeared with counsel in a given prosecution, the event that triggers operation of Section 3161(c)(2) can never happen again.

Respondent and the court of appeals, however, propose that the defense preparation period runs not from the

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[7] "First" is defined as "before any or some other person or thing (as in time, space, rank, or importance)." *Webster's Third New International Dictionary* 856 (1976 ed.).

date of the defendant's first appearance with counsel, but rather from his second, third, or perhaps 100th appearance with counsel. They would measure the 30-day period from the defendant's first "post-superseding indictment" appearance with counsel. But the statute simply contains no such qualification.

Indeed, Section 3161(c)(2) does not use the date of indictment as a reference point at all. "Nothing on the face of the statute supports" (*United States* v. *Naftalin*, 441 U.S. 768, 772 (1979)) respondent's argument that the return of a superseding indictment triggers a new preparation period. On the contrary, instead of referring to the date of indictment, Section 3161(c)(2) links the 30-day moratorium during which trial may not begin to the date of the defendant's first "appearance" *with counsel*. It thus assures a defendant that his attorney will have at least 30 days in which to prepare for trial. Had Congress intended that the return of a superseding indictment trigger a second moratorium on commencement of trial, it surely would have worded the statute so to provide.

2. a. Other provisions of the Speedy Trial Act confirm that Congress did not intend the 30-day preparation period to apply to superseding indictments. Although Congress provided for restarting speedy trial time limits in certain situations, see, *e.g.*, 18 U.S.C. 3161(d)(1), (d)(2) and (e), nowhere in the highly articulated statutory framework is provision made for a new trial preparation period following a superseding indictment. Indeed, close examination of Section 3161(d)(1) and Section 3161(h)(6) makes clear that this omission is deliberate.

Section 3161(d)(1) provides that when an indictment is dismissed on the defendant's motion and a new indictment is filed charging the defendant with the same or a related offense, the government is allowed a new period of 70 nonexcludable days to bring the defendant to trial and the defense is afforded a new 30-day trial preparation period. By contrast, neither Section 3161(d)(1) nor any other provision of the Act makes any provision for restarting of the Speedy Trial Act time limits when it is the *government* that dismisses the original indictment, or when a superseding indictment supplants the original indictment. It is clear, moreover, that this omission does not result from a legislative oversight. Section 3161(d)(1) retriggers the 30- and 70-day time limits upon refiling of charges following dismissal of a *complaint*, regardless of which party is responsible for the dismissal, whereas new time limits are triggered by renewed filing of charges after dismissal of an *indictment* only when the dismissal is "upon motion of the defendant" (18 U.S.C. 3161(d)(1)).

Section 3161(h)(6) of the Speedy Trial Act likewise confirms that this distinction is a deliberate one. That section provides that when an indictment is dismissed upon the government's motion, the period between that dismissal and the defendant's arraignment upon a subsequent indictment charging the same offense is not to be counted against the 70-day period within which trial must be held.[8] In requiring exclusion of the time when a defendant is not held to answer on any indictment, Congress plainly understood that, outside of the reindictment situations covered by Section 3161(d)(1), the time within which a defendant must be brought to trial on a subsequent indictment is measured from his arraignment on the *original* indictment, subject to the tolling rule of Section 3161(h)(6). Thus, when dismissal is on the government's own motion and there is no gap between dismissal and reindictment (so that Section 3161(h)(6) is not directly and literally controlling), the 70-day outside limit for commencing trial is to be computed

[8] See *United States* v. *Bounos*, 730 F.2d 468, 470 (7th Cir. 1984); *United States* v. *Rodriguez-Restrepo*, 680 F.2d 920, 921 (2d Cir. 1982); cf. *United States* v. *MacDonald*, 456 U.S. 1, 7 n.7 (1982).

directly by reference to the date of the original arraignment.[9]

When the 70-day time limit does not begin anew, the defendant should not be accorded a new 30-day preparation period. *United States* v. *Rush*, 738 F.2d 497, 511 (1st Cir. 1984). The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States has also recognized as much in its *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 14 (rev. 1979, with amendments through Aug. 1981) (emphasis added):

> In the opinion of the Committee, *the* [*defense-preparation*] *period does not begin to run anew when superseding indictments are filed in circumstances in which the seventy-day time limit is determined by reference to the original indictment or information.* See Section 3161(h)(6). Nor does a new thirty-day minimum period begin to run if prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea. In all of these situations, the trial court should use its scheduling discretion to ensure that the defense has time to prepare in the circumstances of the particular case.[10]

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[9] See *United States* v. *Rush*, 738 F.2d at 510-511; *United States* v. *Horton*, 676 F.2d at 1170; cf. *United States* v. *Dennis*, 625 F.2d 782, 793 (8th Cir. 1980).

[10] The 1984 revision of these guidelines adds the observation that the Ninth Circuit's interpretation of Section 3161(c)(2) is, in this respect, contrary to the Committee's view. Comm. on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 15-16 (rev. 1979, with amendments through Oct. 1984) ("*Judicial Conference Guidelines* (1984)"), citing *United States* v. *Harris*, 724 F.2d 1452 (9th Cir. 1984).

Curiously, in its decision in *United States* v. *Arkus*, 675 F.2d 245 (1982), in which it first adopted the reading of Section 3161(c)(2) applied in this case, the Ninth Circuit observed that the district court's plan for prompt disposition of criminal cases, approved by the Circuit Judicial Council (under 18 U.S.C. 3165(a)-(c)), required that the 30-day defense preparation period be reckoned from the original indictment whenever the outside time limit for trial was to be so computed. 675 F.2d at 248. That district court plan tracks the approach of the Judicial Conference Guidelines. The *Arkus* panel summarily concluded, however, that the local plan conflicted with the requirements of the Act in this respect and was to be disregarded. *Ibid.*

It should be noted that in *Arkus* the *prosecutor* had urged that the defendant was entitled to a new 30-day preparation period following reindictment. 675 F.2d at 247-248. The defendant had moved to dismiss the indictment on the ground that his trial was commenced beyond the 70-day outside time limit; the government responded that the 70-day period had been extended by the need to allow the defendant a new 30-day preparation period following reindictment. *Ibid.* Even when the government's mistake in *Arkus* was acknowledged, however, the Ninth Circuit refused to reconsider its reading of Section 3161(c)(2), adhering to *Arkus* in *Harris* and in the decision below.

As we explain next, unless the Judicial Conference Guidelines are followed a paradox ensues: there may be no date on which a timely trial may be held where a superseding indictment is returned more than 40 days after filing of the original indictment.

b. The court of appeals' interpretation of Section 3161(c)(2) renders the Act potentially unworkable because it engenders a clash between the requirements of that section and the fundamental provision of the Act—the outside time limit for trial established by Section 3161(c)(1). If a superseding indictment is returned after the 40th speedy trial day has passed, allowing a new 30-day defense preparation period after rearraignment may cause the earliest permissible trial date to fall more than 70 speedy trial days after the original indictment.

This is so because Section 3161(c)(2) is not an excludable delay provision. Compare 18 U.S.C. 3161(h)(1)-(9); see page 18 note 11, *infra*. Thus, if a defendant's first post-superseding-indictment appearance with counsel is, for instance, on the 50th speedy trial day, and trial may not commence for 30 days thereafter, absent some unrelated excludable delay the outside time limit for

commencing trial will be exceeded. Under the applicable sanctions provisions of the Act such a violation of the 70-day limit would require dismissal of the indictment (with or without prejudice). See 18 U.S.C. 3162(a)(2). Plainly Congress could not have intended that the Speedy Trial Act be interpreted so as to confront prosecutors and the district courts with the choice of trying criminal cases impermissibly early or impermissibly late. The artificial construction of Section 3161(c)(2) that creates this dilemma accordingly should be rejected.[11]

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[11] It is not impossible to construe the Act as did the court below and still avert this clash between Section 3161(c)(1) and Section 3161(c)(2). But to do so requires distorting the Act in other respects.

First, Section 3161(c)(2) could be treated as an excludable delay provision that tolls running of the 70-day time limit. Indeed, this view was adopted by the district court in *Arkus*. See 675 F.2d at 248. But the moratorium on commencement of trial created by Section 3161(c)(2) is not included in the catalog of events creating excludable time, 18 U.S.C. 3161(h)(1)-(9); nor is it fairly described as "[an]other proceeding[] concerning the defendant" within the meaning of the generic exclusion for such proceedings, 18 U.S.C. 3161(h)(1). Moreover, if the 30-day defense preparation period automatically creates excludable time following a superseding indictment it is not apparent why the same is not true following every initial indictment. Of course, the result of recognizing such an exclusion would be to convert the 70-day outside time limit for trial into a 100-day time limit in every case. Obviously if Congress intended that result it would have so indicated clearly. See *United States* v. *Richmond*, 735 F.2d 208, 214 (6th Cir. 1984).

In *Arkus* the Ninth Circuit rejected the view that the 30-day defense preparation period tolls running of the 70-day period, concluding instead that the two periods run concurrently following return of a superseding indictment. 675 F.2d at 248. It is apparently the Ninth Circuit's view that trial should commence in such a case the day that the second defense preparation period expires. *Ibid.* But there is no more basis in the statutory language for this construction of the Act than there is for the interpretation discussed just above. And this second alternative approach is wholly unworkable because it allows the parties and the district court

This case well illustrates the paradox we have identified. The original indictment here was filed on February 18, 1983; respondent was arraigned the same day. The superseding indictment was filed 56 days later. No pretrial motions were filed in this case, and other pretrial proceedings (filing of the indictment and the re-arraignment) that create time excludable from the 70-day outside time limit for trial account for only two days. Accordingly, only 16 days then remained in which to commence respondent's trial. Respondent was arraigned on the superseding indictment on April 18, 1983. If respondent had been given a new 30-day preparation period at that point, his trial could not have begun until May 18, 1983, 17 days after the 70-day time limit had expired. Yet the circumstances of this case would have provided no justification for extending the 70-day limit so as to accommodate the additional delay. Compare pages 20-21, *infra*. Respondent would accordingly have secured the right to dismissal of the indictment simply by invoking his supposed right to a new preparation period.

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only one permissible trial date. It seems safe to say that Congress did not have any such unmanageable regime in mind.

A third alternative for reconciling the 30- and 70-day rules under the court of appeals' decision would be to require the government to seek an "ends of justice continuance" under Section 3161(h)(8) of the 70-day outside time limit in order to accommodate the new 30-day defense preparation period. This is in fact the course that we have recommended to federal prosecutors in the Ninth Circuit who must comply with the decision under review at the present time. But it is inconceivable that Congress expected the government to have to seek a special continuance simply to preserve any window at all within which a case may be tried following a superseding indictment. And this approach would result in wholly unwarranted delays in many cases in which the return of a superseding creates no justification for trial delay. See pages 31-33, *infra*. Instead, as we explain in the ensuing text (pages 19-20), Congress surely expected that the defendant—the person actually seeking a delay of trial—would request an appropriate continuance of trial under Section 3161(h)(8)(B)(iv) if one were needed.

3. An additional provision of the Speedy Trial Act overlooked by the court of appeals supports our reading of Section 3161(c)(2). The Speedy Trial Act contains not one but two provisions that tend to ensure that defendants have adequate time to prepare for trial. The first is, of course, Section 3161(c)(2), the operation of which is directly at issue here. Section 3161(c)(2) assures that every defendant is afforded at least 30 days in which to prepare his case with the assistance of counsel. But a distinct provision, Section 3161(h)(8), is designed to ensure adequate preparation time to defendants when special circumstances of the case require that further defense preparation time be allowed beyond the time when the prosecution would be obliged by Section 3161(c)(1) to proceed to trial.

In enacting Section 3161(c)(2) in 1979 (see pages 27-30, *infra*), Congress recognized that both defendants and the prosecution sometimes need more preparation time than Section 3161(c)(1) on its face allows. Thus Congress simultaneously amended Section 3161(h)(8), which authorizes discretionary "ends of justice continuances" that are excludable from the outside time limit for trial, in order to make clear that a continuance should be granted where failure to grant one

> would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant * * * continuity of counsel, or would deny counsel for the defendant * * * the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. 3161(h)(8)(B)(iv).[12] Section 3161(h)(8)(B)(iv) gives the Act the necessary flexibility to accommodate the effect of a superseding indictment. It adequately protects a defendant who legitimately needs additional preparation time for any reason, including the return of a superseding indictment, and who makes a

[12] See S. Rep. 96-212, 96th Cong., 1st Sess. 26, 31, 35 (1979); H.R. Rep. 96-390, 96th Cong., 1st Sess. 12 (1979).

properly supported application for such a continuance to the district court. See *United States* v. *Aviles*, 623 F.2d 1192, 1196 (7th Cir. 1980).

Moreover, within the 70-day limit of the Speedy Trial Act, the court has inherent authority to grant a continuance upon a proper showing of need, following a superseding indictment. If the district court abuses its discretion in denying a continuance, appellate relief is available. See, *e.g.*, *United States* v. *Todisco*, 667 F.2d 255, 260 (2d Cir. 1981); *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979). Thus, in the era of the Speedy Trial Act, just as before its enactment, the district court's sound exercise of its inherent discretion to govern its calendar protects any defendant who seeks a continuance to prepare for trial on a superseding indictment that alters the charges in a manner that creates a legitimate need for delay.[13] Accordingly, there is no reason to extend the application of Section 3161(c)(2) beyond the circumstances specified on the face of the statute.

B. The Legislative History Of Section 3161(c)(2) Indicates That An Automatic 30-Day Postponement Of Trial Following A Superseding Indictment Was Not Intended

The legislative history of the Speedy Trial Act is also inconsistent with the court of appeals' reading of Section 3161(c)(2). A dominant theme that is reflected in the 1974 Act's legislative history was Congress's desire to obtain prompt disposition of criminal charges and swift punishment of offenders—a policy that is directly contrary to the court of appeals' recognition of a second automatic preparation period following the return of a superseding indictment. And Congress assured that the speedy trial mandate of the Act would not undermine the rights of defendants by authorizing them to seek

[13] Of course, where the outside time limit for trial must be extended to allow a reasonable continuance to the defendant, Section 3161(h)(8)(B)(iv) authorizes the necessary exclusion of time.

appropriate continuances to extend trial deadlines where necessary. Moreover, when Congress added Section 3161 (c) (2) to the Speedy Trial Act in 1979, it endorsed the provisions of the Speedy Trial Act interpretive guidelines that had previously been adopted by the Second Circuit. These guidelines pioneered the 30-day trial preparation period but made clear that a defendant was not automatically entitled to a new 30-day preparation period following the return of a superseding indictment.

1. As originally enacted, Title I of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, established only outside time limits within which a criminal case had to be tried. See 18 U.S.C. (1976 ed.) 3161(c). It set no limit on the degree of expedition permitted. Moreover, the legislative history of the 1974 Act reflects little concern on the part of Congress that its provisions might cause defendants to be tried before they are ready. See generally, S. Rep. 93-1021, 93d Cong., 2d Sess. (1974); H.R. Rep. 93-1508, 93d Cong., 2d Sess. (1974). Instead, the legislative history conveys Congress's paramount concern that substantial pretrial delays are prejudicial to society's interests.

Prior to 1974, only the speedy trial guarantee of the Sixth Amendment restrained trial delay. In the view of Congress, however, the Sixth Amendment was inadequate to protect the public's right to speedy justice. S. Rep. 93-1021, *supra*, at 14-15. Congress was particularly concerned about the prevailing level of pretrial delay in federal criminal cases because it was aware of a 1970 National Bureau of Standards study indicating that the likelihood that a defendant who is released pending trial will commit additional crimes while on bail "increases significantly if he is not brought to trial within 60 days of arrest." *Id.* at 8; H.R. Rep. 93-1508, *supra*, at 14. In order "to assist in reducing crime and the danger of recidivism by requiring speedy trials" (*id.* at 8) and alleviate the administrative and financial burden of drawn out proceedings and lengthy pretrial detention of the accused (*id.* at 15), Congress in 1974 required

indictment within 30 days of arrest, arraignment within 10 days of indictment, and trial within 60 days of arraignment. 18 U.S.C. (1976 ed.) 3161(b) and (c).[14]

The 60-day arraignment-to-trial limit was supported by the American Civil Liberites Union and some members of the defense bar. See *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 226 (1974) [*"1974 House Hearings"*] (statement of Charles Morgan); *id.* at 338 (statement of Ivan E. Barris).[15] Some others argued that the proposed bill provided insufficient preparation time for defense attorneys. See, *e.g., Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 145, 150 (1973) (statement and testimony of Gilbert S. Rosenthal). But there was evidently little support in Congress for the latter position. The House observed that the Act provided the district courts with ample authority to protect defendants' interests, emphasizing that "the defendant may request the court to continue his case for reasons which are within the interest of justice." H.R. Rep. 93-1508, *supra*, at 15.

Thus, as enacted in 1974, Section 3161(c) contained only an outside time limit for commencing trial; it did not mandate any fixed minimum interval before trial. At the same time, however, Congress emphasized that it

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[14] In 1979 Congress folded the second and third intervals into the present Section 3161(c)(1), which sets a single 70-day deadline for commencing trial, running from indictment or arraignment, whichever occurs last (see page 8, *supra*).

[15] Barris testified (*1974 House Hearings* 338): "As I read Senate bill 754, I think there are certainly adequate protections to the rights of the defendant, there are provisions by which discretion can be exercised by the trial judge in seeing that the rights of the individual to a complete and full hearing are not trampled under in the headlong rush for the disposition of a trial."

had no intention to sanction "assembly-line justice" (H.R. Rep. 93-1508, *supra*, at 15). Congress ensured against the latter result by authorizing the district court to suspend the running of the outside time limit for trial by granting an "ends of justice continuance." Such a continuance was made available in various circumstances, when "the ends of justice served by granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. (1976 ed.) 3161(h)(8).

2. The evolution of the 30-day defense preparation period began with a set of guidelines issued by the Second Circuit Judicial Council interpreting the 1974 Act. Judicial Council Speedy Trial Act Coordinating Comm., *Guidelines Under the Speedy Trial Act* (Jan. 16, 1979), *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386-436 (1979) [*"1979 Senate Hearings"*].[16] Issuance of these guidelines was presumably prompted at least in part by the approaching effective date of the sanctions provisions of the 1974 Act.[17] The guidelines provided detailed guidance to the district courts in the Second Circuit as to the application of each provision of the Act. In addition, a preamble to the Second Circuit guidelines contained the suggestion that district courts generally allow a preparation period of at least 30 days before proceeding to trial when requested to do so by a defendant or the government (*Guidelines*, *reprinted at 1979 Senate Hearings* 392-393):

> To insure the accomplishment of the goal of accommodating the interests of speedy disposition of the charges with reasonable requests by counsel for adjournments, whenever the time between arraignment and the scheduled trial date does not exceed thirty (30) days, the Court shall (a) view a request for an adjournment of trial to a date beyond thirty (30) days but within the sixty (60) day limit liberally and (b) where such a request is denied, set forth its reasons for finding that the denial of the adjournment does not interfere with the defendant or Government's choice of counsel, or the parties' ability to prepare for trial without undue pressure.

Significantly, the Second Circuit guidelines also made clear that this recommendation was not intended to be applied, willy-nilly, to trials upon a superseding indictment. The guidelines discuss in considerable detail the application of the 1974 Act's 60-day arraignment-to-indictment deadline to various situations in which an additional or superseding indictment is filed. *1979 Senate Hearings* 415-420. The guidelines explain that in the situation where a superseding indictment adds new charges, trial of the original charges must begin "within the time limit for commencement of trial on the original indictment or information," whereas a new 60-day period is available in which to try newly charged offenses. *Id.* at 416-417, 418-419. Moreover, the Second Circuit guidelines offered a hypothetical illustration of this principle in which a superseding indictment containing both new and previously charged offenses is handed up on the 55th day of the 60-day arraignment-to-indictment period established by the 1974 Act. *Id.* at 418. The guidelines explain (*id.* at 418-419; emphasis added)

> [I]n this hypothetical, following the arraignment on the superseding indictment, there are only five (5) days of non-excluded "arraignment-trial" interval time left for trial of those offenses in the superseded-

[16] The Second Circuit guidelines are also reprinted in *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 306-353 (1979), and at 125 Cong. Rec. 15457-15467 (1979).

[17] The 60-day arraignment-to-trial time limit adopted in the 1974 Act was phased in gradually over a four-year period ending July 1, 1979, rather than being made effective immediately. 18 U.S.C. 3161(g). Moreover, the mandatory dismissal sanction for a violation of the applicable time limits was not to take effect until July 1, 1979. 18 U.S.C. (1976 ed.) 3163(c).

> ing indictment that are contained in the original indictment. *If the Government wishes to try all counts of the superseding indictment together*, which is presumably the case, *it will have to be prepared to try the entire indictment five (5) days after arraignment* [unless an] (h)(8) continuance [of the deadline for trying the original charges] is granted.

The Second Circuit guidelines thus indicate that the government is free to proceed to trial immediately following return of a superseding indictment—upon all charges—if it wishes to do so. The 30-day preparation period recommended by the Second Circuit guidelines was therefore not routinely applicable to trials upon a superseding indictment. Rather, requests of defendants seeking to postpone trial on a superseding indictment were to be carefully scrutinized on a case-by-case basis.[18] Because, as we explain below, Congress borrowed heavily from the Second Circuit guidelines in amending the Speedy Trial Act in 1979, and endorsed the Second Circuit's approach

[18] The guidelines observe that a superseding indictment may properly be employed to add charges that do not even arise out of the same transaction as those previously charged, offering the example of additional bank robberies committed by a single defendant. *1979 Senate Hearings* 420. The guidelines encourage the granting of an (h)(8) continuance in such situations, "where necessary" to permit a single trial on properly joined charges, evidently assuming that either the prosecution or the defendant is likely to need more preparation time on the new charges in such cases. *Ibid.* But the guidelines emphasize that this will not invariably be required (*ibid.*; emphasis added):

> It is noted that often, before the filing of a superseding indictment, the defendant is advised by the Government attorney that the Government will offer evidence of other charges at trial, and full discovery is conducted with respect to such other charges. *Where these other charges are incorporated in a superseding indictment, the Court may wish to adhere to the originally scheduled trial date,* after finding that under the circumstanes, neither party needs any additional time to prepare for trial on the superseding indictment. *Nothing in these comments precludes such action by the Court.*

to implementation of the Act, Section 3161(c)(2) should not be construed to require an automatic 30-day postponement of trial following return of a superseding indictment.

3. As we have mentioned, the minimum defense preparation period was introduced into the Speedy Trial Act by the 1979 Amendments, which added 18 U.S.C. 3161(c)(2). The defense preparation period provision received comparatively little attention in the legislative history, however. The primary focus of attention was proposals of the Justice Department and the Judicial Conference that would have substantially increased the maximum time limits that were included in the 1974 Act.[19] But the pertinent legislative history does confirm that the 30-day minimum preparation period was adopted from the Second Circuit guidelines, and it lends no support whatsoever to the court of appeals' reading of this provision in the instant case.

While Congress rejected the appeal made by the Justice Department and the Judicial Conference for a significant extension of the basic deadlines set in 1974, the arraignment-to-trial deadline was enlarged to 70 days (see page 23 note 19, *supra*), and a host of clarifying changes were made, particularly in the excludable time provisions of the Act. In addition to these actions, of course, Congress established the 30-day minimum preparation period.

a. There is relatively little in the legislative history of the 1979 Speedy Trial Act amendments that bears directly on the question whether a new defense preparation period must be allowed automatically following a superseding indictment. But the available legislative history makes clear that Section 3161(c)(2) was not designed to anticipate every development in the course of a prose-

[19] See S. 961, 96th Cong., 1st Sess. (1979) (Justice Dept. bill), *reprinted in 1979 Senate Hearings* 4-5; S. 1028, 96th Cong., 1st Sess. (1979) (Judicial Conference bill), *reprinted in 1979 Senate Hearings* 9-10. See also S. Rep. 96-212, 96th Cong., 1st Sess. 14-28 (1979); H.R. Rep. 96-390, 96th Cong., 1st Sess. 4-11 (1979).

cution that might make extra preparation time appropriate, or to obviate exercise of the district court's discretionary authority to grant appropriate continuances. The Senate Report states simply that "[t]his provision assures the defendant some *minimal* time to prepare." S. Rep. 96-212, 96th Cong., 1st Sess. 32 (1979) (emphasis added). Significantly, Congress saw the problem of the defendant's ability to prepare for trial primarily as a problem of unwarranted judicial unwillingness to grant ends-of-justice continuances of the *outside* time limit for trial. *Id.* at 26.[20]

As we have already observed (page 20), Congress's response was to rewrite Section 3161(h)(8) to make clear that the defendant's need for reasonable preparation time is a proper basis for granting such a continuance. See S. Rep. 96-212, *supra*, at 26, 31, 33; H.R. Rep. 96-390, 96th Cong., 1st Sess. 12 (1979). Plainly then, the legislative history provides no support for the wooden reading of Section 3161(c)(2) adopted by the court of appeals. It was Congress's intent simply to provide the defendant with a modest preparation period that would be sufficient for counsel to prepare in most cases; special circumstances requiring further preparation time that arise in a much smaller class of cases were to be addressed through applications for continuance addressed to the district court's informed discretion.

b. The legislative history also demonstrates that Congress was familiar with and endorsed the Second Circuit guidelines, including the 30-day trial preparation period. During the legislative hearings there was some testimony

[20] The Senate Report states (at 26):

> If courts, feeling compelled to schedule trials immediately, are loathe [sic] to grant "ends of justice" continuances to permit adequate preparation time—and the Committee finds considerable evidence that many are—and construe automatically-excludable delays with too much inflexibility, the defendant and his counsel may shoulder an unintended and unwarranted share of the speedy trial burden.

that defendants were being brought to trial in less than 30 days, resulting in inadequate time to prepare (see *1979 Senate Hearings* 93 (testimony of John Cleary)), and there was considerable testimony that the 60-day arraignment-to-trial deadline denied defendants as well as the government needed preparation time. See, *e.g.*, *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 75 (1979) ["*1979 House Hearings*"] (testimony of Judge Feikens); *1979 Senate Hearings* 115 (statement of Salvatore Martoche). While some members of Congress were skeptical that any reform was needed in this area, see, *e.g.*, *id.* at 15 (remarks of Rep. Conyers), the view that predominated was that the Second Circuit guidelines offered an appropriate model for correcting any problem in this area. Thus, in response to the plea of defense counsel spokesman Louis Haremski that "[w]hat we need is just a little more time to the defense to prepare for trial" (*1979 Senate Hearings* 121), Senator Biden, a principal sponsor of the bill ultimately enacted by the Senate, responded (*id.* at 122):

> [I]t seems to me that the second circuit application of the present rules, the second circuit guidelines which would allow the 30-day minimums, could accommodate that concern.

Both the Senate and House Hearings, moreover, identified Section 3161(c)(2) directly with the Second Circuit guidelines. *1979 Senate Hearings* 82 (testimony of Prof. Freed and remarks of Sen. Biden); *1979 House Hearings* 14-15 (testimony of Shirah Neiman). The House Report spotlights the latter testimony. H.R. Rep. 96-390, *supra*, at 6. The solution ultimately adopted by Congress, enactment of Section 3161(c)(2) coupled with amendment of Section 3161(h)(8), directly follows the Second Circuit's model.

Moreover, the Second Circuit guidelines as a whole were a primary object of attention during Congress's

consideration of the 1979 Amendments. They were reproduced in haec verba in the record of both the House and Senate hearings, as well as in the Congressional Record. See page 244, note 16, *supra*. And the hearings themselves are replete with descriptions of and laudatory references to these guidelines.[21] The Senate Report commended the Second Circuit guidelines to the courts generally as a source of instruction on the proper application of the Act (S. Rep. 96-212, *supra*, at 20):

> The Second Circuit has interpreted the Act and its legislative history in a creative manner which preserves its objectives and specifically addresses most of the problems which have hindered its smooth implementation * * *. After careful reading, the Committee is of the opinion that the Second Circuit guidelines are worthy of consideration by all the districts as a model for future implementation, consistent with presently-contemplated changes. The Committee invites every circuit council and district chief judge to give them the closest attention possible.

The Second Circuit guidelines were also a centerpiece of Senator Biden's remarks to the Senate urging adoption of the 1979 Amendments. 125 Cong. Rec. 15456-15457, 15467 (1979). In these circumstances, even if the statutory language and structure left any room for doubt, Congress should be understood to have followed the Second Circuit's model, which clearly did not require a further automatic pretrial delay following return of a superseding indictment.

C. Practical Considerations Also Argue Against Extension Of Section 3161(c)(2) To Superseding Indictments

The primary purpose of the Speedy Trial Act was to accelerate criminal trials. The defense preparation pro-

[21] *1979 Senate Hearings* 68, 72, 73, 131, 133, 134, 135, 138, 147; *1979 House Hearings* 10, 354.

vision was added to the Act as a grace note to ensure that defendants' rights to effective representation by counsel are not inadvertently undercut. There is inevitably some degree of tension between the fundamental goal of the Act—prompt disposition of criminal cases—and the countervailing policy of Section 3161(c)(2). This tension is minimized, however, if Section 3161(c)(2) is construed, in common-sense fashion, to allow one automatic preparation period at the outset of a prosecution, when some preparation time will always be needed, and to require defendants to request and to demonstrate the need for additional delay following the return of a superseding indictment.[22]

1. Following the return of an original indictment, the defendant necessarily has much to do. He must retain counsel. He must consider how to plead. He must evaluate possible lines of defense and locate and interview witnesses. Usually, his attorney must prepare and file pretrial motions. The defendant and his counsel must confer on trial strategy. Consequently, there is a legitimate need for 30 days' preparation time following the return of the original indictment in most cases. At the same time, because the period is measured from the defendant's first appearance with counsel, a date that generally occurs within days of indictment, this preparation time would rarely frustrate society's interest in swift justice.

In contrast to an original indictment, a superseding indictment will often require no further trial preparation on the part of the defendant. Superseding indictments

[22] In many instances, both the prosecution and the defense may prefer for reasons of convenience to have a trial delayed. But it is quite clear that Congress did not mean to permit the parties to delay trials, even by mutual agreement, except under certain specified circumstances. See S. Rep. 96-212, *supra*, at 28-29. The decision of the court of appeals enables the parties to circumvent this policy almost at will by the simple expedient of having a superseding indictment with trivial changes returned shortly before the scheduled trial date.

are obtained for a variety of reasons. They are regularly and appropriately obtained for purposes that have no material bearing upon the ability of a defendant to be ready for trial. For instance, they are often, as here, returned for the sole purpose of correcting a typographical error or other purely formal error in the original indictment. The correction of such an error will rarely create the need for additional preparation time, yet if Section 3161(c)(2) is read as respondent proposes, trial must await the expiration of a new, superfluous preparation period in such cases.[23]

In the same vein, superseding indictments are frequently returned to eliminate some of the charges. See, *e.g.*, *United States* v. *Horton*, *supra*. Such action reduces rather than increases the burden on the defense. Yet under the court of appeals' interpretation, the Act would nevertheless require a delay of the trial date in this situation. Superseding indictments are also used to drop or add defendants without altering in any manner the charges facing the original defendants. See, *e.g.*, *United States* v. *Guzman*, 754 F.2d 482, at 486 (2d Cir. 1985) (dropping defendants on possession count); *United States* v. *Rush*, 738 F.2d at 510 (adding a defendant). Again, these situations create no basis for *requiring* deferral of trial as to the original or remaining defendants.[24]

Superseding indictments may also be employed to alter or add charges. The latter may be additional charges arising out of a common criminal incident, or may even be factually unrelated repetitions of the same kind of

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[23] A new indictment may also simply reinstitute charges that had been dropped because of the unavailability of a witness. See, *e.g.*, *United States* v. *Arkus*, *supra*. In such cases the need for additional defense preparation time turns on the circumstances of the case; there is no warrant for assuming that the need for preparation is the same as though the defendant had never been previously charged.

[24] Under Section 3161(h)(7), joinder of new defendants may permit deferral of the commencement of trial as to all defendants.

offense. But the Second Circuit guidelines indicate (see pages 24-26, *supra*) that such superseding indictments also do not necessarily require 30 days of additional defense preparation time. Frequently, a superseding indictment simply conforms the indictment more precisely or in greater detail to the contents of the bill of particulars, or otherwise reflects the filing or disposition of pretrial motions. Or a superseding indictment may simply add substantive counts that already were part of the original indictment in the form of overt acts charged under an overarching conspiracy count. In such situations the return of a superseding indictment ordinarily does not add to the defendant's task of preparation. Even when an indictment is superseded to charge a given criminal transaction in a different manner, the new indictment does not always require significant additional preparation; the defendant's defense may be equally applicable to the new indictment and his strategy may be totally unaltered by the change in the offenses charged. And, as the Second Circuit guidelines point out, even when completely new criminal transactions are charged, delay may be unnecessary because the prosecution has given the defendant sufficient informal notice prior to the return of the superseding indictment as to the evidence and theories to be adduced against him. See page 26 note 18, *supra*.

2. a. With the exception of the court below, the courts of appeals have uniformly rejected the view that the return of a superseding indictment automatically triggers a new pretrial preparation period. See page 9 note 6, *supra*. Several courts have, however, suggested in dictum that there may be circumstances in which a new statutory 30-day period would be warranted. For instance in *Rush*, 738 F.2d at 511, the First Circuit indicated that it might apply Section 3161(c)(2) to a superseding indictment if "in a specific case [to do otherwise] would deprive a defendant of adequate opportunity to prepare his defense." Similarly, in *United States* v. *Wil-*

liford, No. 83-1376 (5th Cir. Feb. 27, 1984) slip op. 4-5, the Fifth Circuit declined to "announce [or] imply a general rule that a defendant is never entitled to assert the protection of § 3161(c)(2) when the government secures a superseding indictment," explaining (*id.* at 5):

> Whether a defendant is entitled to a new 30-day period is a question properly within the province of the trial judge's discretion. The judge must give due consideration to the purpose and intent of the Speedy Trial Act and carefully examine the details of the case for any prejudice to the defendant.

To the extent that these cases may suggest that Section 3161(c)(2) *itself* requires a *30-day* continuance following arraignment on a superseding indictment that creates need for additional defense preparation time, we believe they are erroneous, potentially confusing, and unnecessary. Such situations are fully accommodated by the defendant's right to make known his need for additional time, invoking the court's traditional authority to grant a continuance (in conjunction, where necessary because the continuance would exceed the Act's 70-day outer limit, with Section 3161(h)(8)(B)(iv)). See pages 19-21, *supra*.

The language and structure of the Act, coupled with relevant policy considerations, strongly suggest that Congress could not have intended the rigid provisions of Section 3161(c)(2) to provide the vehicle for selectively affording further preparation time to defendants in those cases where it may be justified. Applying Section 3161(c)(2) in the case of *some* superseding indictments does not avoid most of the objections to application of Section 3161(c)(2) to *all* superseding indictments. See pages 13-19, *supra*. Especially significant in this connection is the need to interpret the 30-day preparation provision in a manner that does not foster violations of Section 3161(c)(1). After all, the outside time limit for trial is not automatically extended even when the superseding

indictment would warrant a continuance.[25] It is thus unlikely that Congress intended that a new 30-day period be triggered "automatically" in certain cases, based on a detailed assessment of the facts involved, when the result would be to force the court and the government into violation of their own Speedy Trial Act deadline, at least absent a timely request by a party for a *discretionary* ends-of-justice continuance. See pages 17-19 & note 11, *supra*.

Moreover, the ostensibly flexible reading of the 30-day rule suggested by the First and Fifth Circuits would create unnecessary disruption of district court calendars. Even when additional trial preparation is warranted following a superseding indictment, a full 30 days often will be unnecessary. Yet the "flexible" interpretation of Section 3161(c)(2) actually deprives the court of the ability to gauge the amount of additional trial time needed by the defendant as it is determining whether further time is needed at all. In addition, this interpretation will prove difficult for the lower courts to administer, since it leaves quite unclear when an "automatic" 30-day period is required and when it is not. One of the virtues of Section 3161(c)(2) as written—and, we might add, the only virtue of the Ninth Circuit's sharply contrasting construction—is that it is truly clear to the court and the parties when the right to an automatic preparation period exists.[26]

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[25] For example, if a superseding indictment is returned on the 50th nonexcludable day, with trial set for the 55th day, the court is unconstrained by the Act in granting a continuance of up to 15 days if one is deemed appropriate. Any extension of the continuance beyond that, however, while possible under the Act, must be based upon a finding that it is required by the ends of justice.

[26] The difficulty that would be created by application of the rigid requirements of Section 3161(c)(2) to trials on superseding indictments is compounded, moreover, because the statute on its face sharply restricts recognition of any waiver of the right conferred: trial in less than 30 days' time is simply prohibited absent "the defendant['s] consent[] in writing." By contrast, if the defend-

Nor is there any reason why it would be unfair to require the defendant—who is in the best position to appraise the impact of a new indictment upon his trial preparation—to seek a continuance if he needs additional preparation time after a superseding indictment. That is the practice that prevailed prior to the enactment of the Speedy Trial Act. And the legislative history of the 30-day rule makes clear that the provision was intended simply to curb an excessive zeal for the promptest possible scheduling of trials that may have been created by the enactment of the original provisions of the Act, rather than any view that other safeguards against hasty trials were generally inadequate. See pages 20, 23-24, 27-28, *supra*. Accordingly, there is no need to press the 30-

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ant's recourse for additional preparation time is to the court's power to grant a continuance in the interest of justice, defendant will be held to have waived any claim if a continuance is not timely sought and justified. While the exact import of the non-waiver language of the 30-day rule appears to be an open question, it seemingly creates some potential for disruption of proceedings by tardily raised claims. This is particularly troublesome because, as noted, the applicability of Section 3161(c)(2) to certain superseding indictments would necessarily be somewhat unclear under the reading entertained by some of the courts of appeals.

We would suggest that the waiver language of Section 3161(c)(2) should not be read to overcome the general rule that claims not raised in district court should not be entertained on appeal, at least not when the submission made on appeal is that, because of the nature of the superseding indictment, a second 30-day preparation period should have been allowed. See *United States* v. *Daly*, 716 F.2d 1499, 1506 & n.5 (9th Cir. 1983); cf. *United States* v. *Powell*, No. 83-1307 (Dec. 10, 1984), slip op. 4 n.6 (declining to consider, *inter alia*, a claim based on Section 3161(c)(2) not considered by the court of appeals). On the other hand, a comparison of Section 3161(c)(2) with the waiver provision applicable to violations of the 70-day outside time limit for trial, which must be objected to "prior to trial" (18 U.S.C. 3162(a)(2)), suggests that tardy invocation of Section 3161(c)(2) may be permissible at the district court level. Because of this possibility, a "bright line" rule as to the applicability of Section 3161(c)(2) is particularly desirable.

day rule into service to prevent unduly quick trials on superseding indictments. A rule that requires the defendant to seek a continuance and justify the amount of time requested is most compatible with efficient management of district court dockets and with the prompt disposition policies of the Act. Accordingly, even if the change effected by a superseding indictment is one that would support allowance of additional time for defense preparation, it does not follow that Section 3161(c)(2) is applicable.

b. A recent decision of the Second Circuit, *United States* v. *Guzman*, 754 F.2d 482 (1985), petition for cert. pending, No. 84-1604, illustrates the proper approach to this problem. There, the original indictment charged Guzman and two others with a conspiracy of two days' duration to possess and distribute cocaine, and with an associated possession offense. Following a mistrial declared on unrelated grounds, a superseding indictment was returned that expanded the duration of the alleged conspiracy to two years and dropped Guzman's co-defendants from the possession count.[27] Guzman sought a continuance of trial, but the court commenced trial on the superseding indictment one day after it had been returned. 754 F.2d at 484-486.

The court of appeals reversed Guzman's conviction on the conspiracy count but affirmed as to the possession count. It held that Section 3161(c)(2) does not "divest[] a district court of its discretion to grant or refuse a continuance" following a superseding indictment "where this discretion is exercised in keeping with the policies underlying specific provisions of the Act." 754 F.2d at 486. Specifically, the court held that "[w]hen a superseding indictment makes only insubstantial changes in an original indictment, so that a defendant has not

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[27] The superseding indictment was sought to overcome a defense objection to admission in evidence of a ledger that recorded narcotics transactions occurring within the extended period of the conspiracy.

been deprived of adequate time to prepare a defense * * * a district court may exercise its discretion in proceeding to trial without further delay" (*ibid.*).

The court concluded that the change in the conspiracy count was significant because the defendant's counsel "specifically indicated to [the district court] that he needed more time to obtain proof that Guzman was not in the country until after the enlarged conspiracy period began"—a "new line of defense, which would not have been available to him under the original indictment" (754 F.2d at 386). The court held that the "district court abused its discretion in not granting defendant Guzman a reasonable continuance to prepare his defense to the charge of participation in a two-year conspiracy." *Ibid.*[28] On the other hand, Guzman's conviction on the possession count was affirmed because "the deletion of co-defendants * * * from the possession count in the second indictment changed neither the prosecution's case, nor conceivable defenses by Guzman" and the defendant "could not possibly have been prejudiced because required to proceed to trial on this charge." *Ibid.*

3. Under the reading of Section 3161(c)(2) adopted by the court of appeals in this case, a new 30-day preparation period is required regardless of the insignificance of the change effected by the superseding indictment. See page 7, *supra*. For the reasons that we have outlined above (pages 13-30), this reading is plainly false to Con-

[28] Although certain of the court of appeals' language in *Guzman* could be read as suggesting that this result was required by Section 3161(c)(2), it is apparent upon close reading that the court looked only to the policy of that section to guide the exercise of district court discretion on a continuance application. Significantly, the court did not require a 30-day delay, but spoke of a "reasonable continuance" and emphasized the particularized showing of need for additional time that defense counsel had made. The court also summarized its holding respecting the conspiracy count by stating that "Guzman should not have been compelled to stand trial on that count until *a reasonable time* after this indictment was filed" (754 F.2d at 484; emphasis added).

gress's intention. On the other hand, under any plausible alternative reading of the statute the judgment of the court of appeals must be reversed. Compare pages 33-38, *supra*.

Unlike the defendant in *Guzman*, respondent has never suggested any reason why the superseding indictment, which merely corrected a typographical error as to the date of his prior conviction, made more trial preparation time necessary. By any standard this change was truly insubstantial. In any event, because the prosecution had notified respondent long before trial of the correct date of his prior conviction, the change made in the superseding indictment provides no conceivable basis for a 30-day postponement of the scheduled trial.[29] If a change such as the one made here is held to require an inflexible 30-day moratorium of commencement of trial, the policies of the Speedy Trial Act will be flouted, rather than served.

II. IN THE CIRCUMSTANCES OF THIS CASE, ANY VIOLATION OF SECTION 3161(c)(2) WAS HARMLESS ERROR

Even if Section 3161(c)(2) could be read to require a new 30-day defense preparation period in the circumstances of this case, the judgment of the court of appeals could not stand. The court below held that a violation of Section 3161(c)(2) is "per se" reversible error requiring that the defendant be afforded a new trial (Pet. App. 2a). There is nothing in the statute mandating this in-

[29] As we explain in connection with our discussion of the harmless error issue (pages 45-47), it is significant that this error could have been corrected without resorting to a superseding indictment. The return of superseding indictment in such circumstances cannot possibly justify delay of the trial. The court of appeals' suggestion that the government is required to live with its election to reindict (Pet. App. 2a) is not responsive to our argument. Congress could not have intended to require a new 30-day preparation period in circumstances where reindictment may be dispensed with.

flexible remedy. And in the absence of such a statutory prescription the court of appeals should have applied the harmless error rule of Fed. R. Crim. P. 52(a). When a harmless error analysis is undertaken it becomes clear that a new trial for respondent is wholly unwarranted.

1. The harmless error doctrine is a fundamental feature of federal criminal law. Rule 52(a) of the Federal Rules of Criminal Procedure commands that "[*a*]*ny error* * * * which does not affect substantial rights shall be disregarded" (emphasis added). And 28 U.S.C. 2111 mandates that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." In *United States* v. *Hastings*, 461 U.S. 499, 509 (1983), this Court reaffirmed "the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations * * *."

"Congress is 'predominantly a lawyer's body'" (*Albernaz* v. *United States*, 450 U.S. 333, 341 (1981), quoting *Callanan* v. *United States*, 364 U.S. 587, 594 (1961)); it presumably was aware of Rule 52(a) when it amended the Speedy Trial Act in 1979. If Congress intended to preclude application of harmless error analysis it would have clearly signaled its intent in the Speedy Trial Act. In fact, nothing in the Act precludes application of a harmless error analysis to violations of Section 3161(c)(2).

The Speedy Trial Act is replete with remedial prescriptions, but none of these provides any sanction for violations of Section 3161(c)(2). For instance, Section 3162(a)(1) requires dismissal of pending charges if the arrest-to-indictment time limit established by Section 3161(b) is violated. Section 3162(a)(2) mandates dismissal of an indictment when a defendant is not brought to trial within the period established by Section 3161(c)(1). (Under either provision dismissal may be with or without prejudice, as the circumstances of the violation

and other statutory considerations dictate.) Section 3162(b) prescribes disciplinary sanctions for attorneys who knowingly delay trial without justification. And when a defendant is incarcerated for more than 90 non-excludable days before commencement of his trial, the statute prescribes "automatic review by the court of the conditions of release" as the proper remedy (18 U.S.C. 3164(c)). Congress plainly knew how to make its intentions regarding appropriate remedies clear. In light of Congress's failure even to address the sanction to be imposed for violation of Section 3161(c)(2), it is plainly inappropriate to suppose that Congress intended to abrogate the harmless error rule in this situation.[30]

Moreover, each of the sanctions set forth in the Act punishes tardiness rather than haste, and thus implements the overriding purpose of the Act. And even as to violations of the Act's central promptness requirements, Congress explicitly allowed dismissals without prejudice. There is accordingly no reason to assume that Congress required that the courts deal inflexibly with insignificant violations of Section 3161(c)(2).[31] There is simply no evidence that Congress intended that an otherwise valid conviction be overturned wholly without regard to whether the defendant's trial preparation could have been assisted by further delay, simply because the defendant was tried 29 days rather than 30 days after his first appearance with counsel.

Indeed, so far as we are aware, the legislative history of the Speedy Trial Act contains no discussion of the

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[30] *Cf. United States* v. *Anderton*, 752 F.2d 1005, 1008 (5th Cir. 1985) (the Speedy Trial Act provides no sanction for a violation of Section 3161(j); the defendant accordingly must show that he has been prejudiced by a violation to win reversal of his conviction).

[31] It is also arguable that the structured choice of remedy with respect to violations of Sections 3161(b) and 3161(c)(1) reflected in Section 3162(a)(1) and (2) is intended to supplant a harmless error analysis there. No similar argument is available here.

appropriate sanction for a violation of Section 3161(c)(2). None of the defense attorneys who appealed to Congress in 1979 to assure adequate preparation time suggested that harmless error principles should be inapplicable in this context. See pages 28-29, *supra*. And while the Second Circuit guidelines, from which Section 3161(c)(2) is derived, did not specifically address the harmless error issue, they did allow the district court latitude to try a case within the first 30 days after an original indictment if the court found that an early trial date would "not interfere with the defendant's or Government's choice of counsel, or the parties' ability to prepare for trial without undue pressure." *1979 Senate Hearings* 393. Accordingly, they tend to suggest that an inflexible rule requiring a new trial in every case in which Section 3161(c)(2) is violated is unwarranted.

2. The Ninth Circuit has itself recognized that the Act does not specify the remedy, if any, for a violation of Section 3161(c)(2). *United States* v. *Daly*, 716 F.2d 1499, 1506 (1983) ("The Act provides no specific guidance as to the appropriate remedy in this case.").[32] But in *Daly*, which the panel in this case followed (see Pet. App. 2a), the court of appeals filled the gap in the statutory language, holding that a new trial is a proper remedy and apparently excluding consideration of harmless error (716 F.2d at 1506):

> [T]he purpose of section 3161(c)(2) is to insure that defendants are allowed sufficient time to prepare for trial. Consistent with this underlying policy, Section 3161(c)(2) essentially establishes that any pretrial preparation period shorter than 30 days is inadequate *per se*. A violation of section 3161(c)(2) thus should be treated like an erroneously denied motion for a continuance, because both of these procedural errors deny a defendant a fair trial by forcing him into court before he has had adequate time for preparation.

[32] In *Daly* the court recognized that Section 3162(c)(2), which prescribes sanctions when "a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h)," does not appear to apply to violations of Section 3161(c)(2), but ultimately found it unnecessary to decide that question. 716 F.2d at 1505-1506. The *Daly* dictum on this point is clearly correct. See *Judicial Conference Guidelines* 76 (1984). We note that Congress did not amend Section 3162(a)(2) in response to enactment of Section 3161(c)(2), and that dismissal of an indictment would be a wholly illogical remedy for any overly speedy trial.

We assume, for present purposes, that the court of appeals is correct insofar as it identified a new trial as an appropriate remedy in a typical case in which the defendant has been denied the statutorily prescribed preparation period. But the analogy that underlies the court of appeals' further conclusion that a statutory violation is "per se" reversible error is faulty and misleading. To be sure, Section 3161(c)(2) reflects Congress's judgment that the specified period of trial preparation time should be permitted by district courts without regard to whether failure to do so would in a particular case be unfairly prejudicial or would deny a defendant due process. The automatic feature of Section 3161(c)(2) thus ordinarily makes it unnecessary and inappropriate for the district courts to engage in a fact-sensitive determination as to the defendant's need for time to prepare a defense. Accordingly, it is *error* to deny the 30-day trial preparation period when required by the Act. But it does not follow that such an error may not be harmless.

Nor does the analogy to an "erroneously denied continuance" support the court of appeals' conclusion here. When not directed otherwise by the Speedy Trial Act, trial courts have considerable discretion as to whether a continuance sought by a defendant should be granted. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 13. Thus, a ruling on the merits that discretion has been abused and that denial of a continuance was therefore "erroneous" *necessarily* imports a determination that the ruling, and thus the error, was prejudicial.

On the other hand, precisely because a violation of Section 3161(c)(2) does not depend upon any showing of prejudice, finding such a violation does not rule out the possibility of harmless error. Perhaps an appeal based on a violation of Section 3161(c)(2) does not require the defendant affirmatively to demonstrate prejudice flowing from the curtailment of pretrial preparation time. But this does not prevent the government from shouldering the burden of demonstrating harmless error.[33]

3. Any error in the present case was undeniably harmless. As we have explained (page 4), the superseding indictment merely corrected a minor typographical error creating a colorable inaccuracy as to the date of respondent's conviction on the predicate offense.[34] Re-

[33] Although this Court has recognized that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" (*Cronic*, slip op. 10), a violation of the 30-day rule of Section 3161(c)(2) plainly is not such an instance. Indeed, in *Cronic* itself the Court rejected the view that the circumstances of the case—salient among which was the fact that defense counsel had only 25 days to prepare (slip op. 15)—"mandated an inference that counsel was unable to discharge his duties" (*id.* at 9). See slip op. 9-18. *Cronic*, together with *Avery* v. *Alabama*, 308 U.S. 444 (1940), and *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970), confirm that prejudice is not so certain to flow from any infringement of a 30-day preparation period as to obviate a harmless error inquiry. Thus, contrary to the Ninth Circuit's view expressed in *Daly*, 716 F.2d at 1506, it is fallacious to assume that a violation of Section 3161(c)(2), like an erroneously denied continuance, necessarily "den[ies] a defendant a fair trial by forcing him into court before he has had adequate time for preparation." It is also noteworthy that juvenile delinquency charges must be tried within 30 days of incarceration, if the juvenile is detained prior to trial. 18 U.S.C. 5036. Congress obviously did not believe that juveniles would be prejudiced by such expeditious proceedings or that they would have inadequate trial preparation time.

[34] In point of fact, neither the original indictment nor the superseding indictment purported to state the exact date of the predicate

spondent and his counsel had every reason to know, from the outset, the correct date of the conviction on the predicate offense. In any event, the superseding indictment simply conformed the indictment to the disclosure made to respondent's counsel long in advance of the scheduled trial date. It contained no surprises and added no charges. It did not increase the defendant's burden, open up new lines of possible defense, or affect the ability of respondent and his counsel to be ready for trial in any manner. There is no conceivable basis for claiming that the typographical error in the original indictment in any way impeded respondent's trial preparation, or that the return of the superseding indictment correcting the error disrupted ongoing preparation. Accordingly, respondent, who was afforded 60 days of preparation time from arraignment to trial, suffered no possible injury from any violation of the Speedy Trial Act that may have occurred here. Thus any such violation should have been deemed harmless, and respondent's conviction should have been affirmed.

Significantly, respondent has never even claimed that the superseding indictment created any *need* for a continuance because of some alteration in the charge. Instead, respondent's counsel simply "demanded" a 30-day continuance after the prosecutor advised him of the Ninth Circuit's decision in *Arkus*. At his arraignment on the superseding indictment, respondent did suggest that he needed additional preparation time. See pages 5-6, *supra*. But the reasons given cannot furnish a basis for holding that the denial of his Section 3161(c)(2) motion was reversible error because they are wholly unrelated to the return of the superseding indictment.

conviction. Rather, the original indictment stated that the prior judgment of conviction was entered "on or about December 17, 1981," whereas the superseding indictment substitutes the phrase "on or about December 7, 1981" (E.R. 4, 7).

In any event, the district court did not abuse its discretion in denying a continuance here.[35]

b. That any violation of Section 3161(c)(2) in this case should be deemed harmless is especially clear because the defendant was afforded more than the 30 days required by the statute between his arraignment on the original indictment and the commencement of trial on the superseding indictment. Arguably the nature of the statutory right involved makes it difficult in most cases to assess claims of harmless error—as for instance when the defendant is tried on the 29th day instead of the 30th following an original indictment. But that difficulty largely evaporates when the defendant has at least once been afforded a full 30 days' preparation time. In such cases the court is not required to make the somewhat subjective determination that a shortfall of a certain magnitude in preparation time should be deemed de minimis. Rather, the court need consider only whether the nature of the change in the indictment is such that there simply was no need for additional preparation time.

A claim of inadequate preparation time in connection with a superseding indictment is distinctive in another respect as well, at least where, as here, it was not even necessary to resort to a superseding indictment. Rather than resubmitting the case to the grand jury, under

[35] Respondent claimed, first, that he was not prepared to defend Count 2 because he needed additional time to review his immigration file. But the district court accepted the government's responsive offer to dismiss Count 2 and thereby mooted respondent's plea for extra time on that score. See page 6, *supra*.

Respondent also claimed that he needed time to secure a fingerprint expert who could determine if he was, in fact, the same person who was convicted of illegal entry on December 7, 1981. Because the court made reasonable efforts to accommodate respondent in this regard without postponing trial (see page 6, *supra*), and because respondent ultimately decided to stipulate that he was indeed the person convicted of the predicate offense on December 7, 1981, the district court's ruling cannot be faulted.

Ninth Circuit precedent the prosecutor could have asked the district court simply to "amend" the original indictment to correct the typographical error.[36] And because there is no need for rearraignment following such an amendment, it is inconceivable that Section 3161(c)(2) would have any further application in such a case. Alternatively, the government could simply have proceeded to trial without correcting the typographical error. Because the indictment did not even purport to state the exact date of the predicate conviction, and because the discrepancy was only ten days, the variance between the indictment and the proof would surely have been deemed immaterial.[37] Particularly in the context of a harmless error analysis, it is no answer to observe, as the court of appeals did (Pet. App. 2a), that the government is bound by its decision to seek reindictment rather than pursuing either of these alternative courses. Given the ready availability of these alternatives there can be no contention that respondent was deprived of a substantial right here.

[36] See, *e.g.*, *United States* v. *Dawson*, 516 F.2d 796, 799-804, cert. denied, 423 U.S. 855 (1975); *United States* v. *Buble*, 440 F.2d 405, cert. denied, 404 U.S. 828 (1971).

[37] See, *e.g.*, *United States* v. *Cochran*, 697 F.2d 600, 604-605 (5th Cir. 1983); *United States* v. *Ward*, 676 F.2d 94, 96-97 (4th Cir.), cert. denied, 459 U.S. 835 (1982); *United States* v. *Alien*, 596 F.2d 227, 231 (7th Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Wright*, 573 F.2d 681, 685 (1st Cir.), cert. denied, 436 U.S. 949 (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1985

STATUTORY APPENDIX

Pertinent provisions of the Speedy Trial Act of 1974, as amended, 18 U.S.C. 3161 *et seq.*, provide:

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded

in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

* * * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

* * * * *

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any pe-

riod of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

* * * * *

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that

it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this Subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

* * * * *

§ 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such

individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161 (h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161 (c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161 (h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

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